Varieties of Constitutionalism

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1. *Introduction*

A host of adjectives can be attached to the word *constitutionalism*: temporal (ancient constitutionalism, medieval constitutionalism), geographic (East Asian constitutionalism, African constitutionalism), religious (Jewish constitutionalism, Islamic constitutionalism), conceptual (liberal constitutionalism, authoritarian constitutionalism). Each adjective identifies a particular intellectual project and provides the basis for some kinds of comparison, at least within adjectival categories. (It would be peculiar though not I suppose impossible to compare medieval constitutionalism with East Asian constitutionalism.)

This Chapter deals with two of the more prominent adjectival categories—a distinction between political and legal constitutionalism (the latter, as we will see, a somewhat misleading term), and a distinction between merely procedural constitutionalism and programmatic constitutionalism. These categories form the substrate, explicit or implicit, of many studies of more specific varieties of constitutionalism. It is important at the outset to stress, though, that the distinctions are better thought of as describing (two) continuums rather than (four) sharply distinct categories.

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2. *Political and Legal (Judicial) Constitutionalism*

Constitutions set up institutions of governance: legislatures, executives, judiciaries, guarantor institutions. They identify the powers each institution exercises and, implicitly or explicitly, the limitations on those powers. They define the mechanisms (election, appointment) by which the institutions are staffed. Contemporary constitutions typically contain lists of rights protected against violation by any government institution. Constitutions, in short, establish the "rules of ruling," to use a phrase from Dieter Grimm. For democratic constitutions, the point of the rules of ruling is effective and responsive government: effective in determining and then implementing the policies preferred by reasonably stable and reasonably deliberative majorities, responsive in altering those policies which those preferences change.

How are the rules of ruling enforced? Political and legal constitutionalism offer competing answers. For political constitutionalists the rules of ruling are enforced by the ordinary play of politics; for legal constitutionalists they are enforced by the courts. For this disagreement to have bite, we have put on the table another proposition. Legal constitutionalists assert that for the rules of ruling to be law they must be entrenched to some degree against modification by the ordinary majorities that can make and alter other policies. Political constitutionalists treat the requirement of entrenchment as akin to Euclid's Fifth Postulate about parallel lines, something inserted into the overall definition of constitutionalism as a matter of choice rather than something as intuitively obvious as the definition's other

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aspects. For political constitutionalists the rules of ruling are not formally entrenched, though as we will see their position relies in part upon the proposition that each rule of ruling is provisionally entrenched as a practical matter in most controversies over the constitution's meaning.

Two terminological points: (1) Though the term "legal constitutionalism" is too deeply entrenched to be displaced, the practice it identifies is better described as judicial constitutionalism. As we will see political constitutionalists do not deny that institutions of governance are created by law, though they have distinctive ideas about what counts as law; for that reason they could fairly say that political constitutionalism is a form of legal constitutionalism.

(2) In their pure forms political and legal constitutionalism assert that *all* the rules of ruling are enforced by politics and the judiciary respectively. But, as noted, the two versions of constitutionalism lie on a continuum. Almost all judicial/legal constitutionalists agree, for example, that *some* rules of ruling—referred to in the United States as "political questions"—are not enforced by the courts but, because they are indeed constitutional provisions, must be enforced through politics. As the range of these political questions expands or contracts, judicial/legal constitutionalism approaches or moves further away from political constitutionalism. Notably, though, for legal/judicial constitutionalists courts determine how broad or narrow the category of political questions is. Changes in the category may result at least in part from quasi-political or prudential calculations by judges about whether their position within the overall system of governance will

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be subject to significant challenge by other political actors. (Such calculations are almost never made explicit in the judges' decisions; they are attributed to the judges by outside observers seeking to explain why changes occurred when they did.)

For what I believe to be primarily polemical reasons—that is, because they are attempting to undermine the widely held view that legal constitutionalism is the only game in town—political constitutionalists tend not to acknowledge the parallel possibility that a limited subset of the rules of ruling could be enforced by the courts. Candidates might include prohibitions against torture and what Rosalind Dixon and David Landau call core democratic rights, though political constitutionalists would want to confine that core more sharply than Dixon and Landau would.

2.1. *Political Constitutionalism*

The case for political constitutionalism is simultaneously simple and paradoxical. The simple part: Democratic constitutions leave open wide ranges of policy to determination by ordinary majorities. Of course using ordinary politics to determine the rules of ruling will be imperfect but using ordinary politics to determine ordinary policies is also and perhaps equally imperfect. For political constitutionalists no good reasons are available for excluding the rules of ruling from that range. Consider some possible grounds of distinction—all of which political constitutionalists conclude fail to do the work of actually explaining why

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the rules of ruling should not be subject to the same play of ordinary politics that other policies are.

One candidate for distinguishing between using ordinary politics to determine the rules of ruling and using it to determine ordinary policies is that, taken all in all, the rules of ruling are more important than the policies that are subject to ordinary majoritarian determination. Yet, is that so? Consider for example that in a federal nation the rules of ruling allocate policy-making authority between national and subnational governments. An example from the United States is that under settled doctrine subnational governments cannot adopt and enforce regulations that place too great a burden on commerce among the states without providing substantial benefits to some important local interest. Applying this doctrine the U.S. Supreme Court held that Iowa (a subnational government) could not enforce a ban on extralong trucks running on highways within Iowa. In contrast it is uncontroversial that ordinary majorities at the national level can decide how progressive the nation's tax system should be. It seems clear that the latter policy, not dealing with the rules of ruling, is substantially more important than the former. And even if we recharacterize the relevant rule about ruling as "federalism and its implications for commerce among the states," it is at least unclear that *that* rule is more important than the rules about tax rates (or, again escalating the characterization, about fiscal policy).

Another candidate for explaining why the rules of ruling should not be subject to determination by ordinary majorities is that those rules are especially

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vulnerable to decisions by nominal majorities that actually are not adequately or fully representative. So, for example, John Hart Ely argued that incumbents have an interest in holding on to their positions and use the rules of ruling—drawing constituency boundaries, regulating political expression—to help them do so. Legislators drawn from majority demographic groups, who are likely to constitute a majority in a parliament, may be systematically inattentive to the interests of minority demographic groups.

Here too, though, the difficulty is that the rules of ruling do not seem *especially* vulnerable to these distortions. For systemic reasons not all of which are attributable to the rules of ruling, wealthy people typically have disproportionate influence in legislatures enabling them to block the adoption of tax rates favored by a popular majority. And, more generally, what political economists call concentrated groups with intense interests—of which many business sectors are an example—have a systematic advantage with respect to ordinary policies over the diffuse interests held by the consuming public. Pursuing this line of argument, political constitutionalists point out, would sharply narrow the range of ordinary policies to be decided by contemporary majorities. Some libertarian-leaning legal/judicial constitutionalists are comfortable with that conclusion but most are not.

A third basis for distinguishing between ordinary policies and the rules of ruling invokes ideas about complexity and principle. Tax and environmental policy, it might be said, involve complex tradeoffs among competing values and interest groups, best resolved by political compromises that sometimes or often have no

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basis in any principle other than "this was what was needed to get something important done." The rules of ruling, in contrast, might be said to involve questions of principle—the principles of free expression and equality, for example, or the principles of accountability that underlie the allocation of power between parliaments and executives.

Here too the contrast is overdrawn. Implementing the principles underlying the rules of ruling often calls for making complex tradeoffs: actually implementing positive discrimination or affirmative action requires such tradeoffs, as does the design of executive bureaucracies in the modern state to define and execute policies chosen by parliaments. And on the side of ordinary policy, tax rates reflect judgments about principles of economic equality and efficiency not different significantly from the principles associated with the rules of ruling. All this can be captured by the observation that the rise of proportionality as a general *judicial* test of constitutionality reflects the understanding that complex tradeoffs occur in every domain of policy.

Political constitutionalism thus can call upon strong intuitions about the place ordinary majoritarian politics can play in determining the rules of ruling: those rules are not readily distinguishable from other policies that are uncontroversially subject to ordinary political determination. Again, it is important to keep in mind that the comparison is between two imperfect processes, not between a perfect one for determining ordinary policies and an imperfect one for determining the rules of ruling.

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The paradox, though, lies in the very idea of ordinary politics. Ordinary politics, it seems clear, is structured by the rules of ruling. People interested in ensuring road safety against the risks created by extralong trucks need to know where they should go to get majoritarian policy made, and the rules of federalism tell them to go to the national legislature rather than subnational legislatures. Indeed, the rules of ruling tell them that the national parliament is the body of people elected according to rules set out in the constitution rather than some rump group of dissidents who simply declare themselves to be the nation's legislature. The rules of ruling, it would seem, are preconditions for ordinary politics. Or, put another way, the rules of ruling must be in place to get ordinary politics up and running—and for that reason cannot be subject to determination by ordinary politics.

Yet, is that actually so? In one sense, yes: at the outset, rules of ruling have to be in place. Once the system is up and running, though, why might not the rules that enabled that outcome be subject to political determination? Consider again the example of tax policy. Suppose that proponents of making the tax system substantially more progressive are working within a constitutional system that requires a two-thirds majority in an upper house to approve any tax increase passed by the lower house by a simple majority. And suppose further that these proponents have support from 60 per cent of the population. The rules of ruling prevent them from enacting their proposal.

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Now the entrenchment of rules of ruling comes into play. Entrenchment means that something more than a simple majority is required to alter (amend) a rule of ruling such as the two-thirds requirement described above. It would not be surprising to find that proponents of the tax proposal might not be able to muster the supermajority needed to amend the two-thirds requirement. And, at that point, the proponents might reasonably describe the overall governance system as unjustifiably undemocratic.

Yet, if the rules of ruling create the very institutions and processes deployed in ordinary politics, how can political constitutionalism get off the ground? By taking *nearly all* but not all the rules of ruling as provisionally settled and targeting only those rules of ruling that impede the adoption and implementation of some specific policy proposal: use free expression to build a majority that will simply ignore the two-thirds requirement for tax increases, for example. This has at least two attractive features. It captures the idea expressed by Jeremy Waldron that political constitutionalism requires institutions to be in reasonable working order; reasonableness is a way of describing the fact that all but a few of the rules of ruling are provisionally settled. In addition, by virtue of their provisional settlement, the rules unchallenged in any specific controversy have a character that is at least law-like even if they might not satisfy some jurisprudential definitions of "law" (and, notably, provisional settlement might satisfy some such definitions).

Critics of political constitutionalism suggest that treating the rules of ruling as only provisionally settled introduces an undesirable degree of uncertainty into

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constitutional systems. Every rule could be put into play—that is, be made subject to ordinary political disputation—at any moment. How can people be confident that the constitutional world in which they live will not disappear in a flash when all or a large number of rules of ruling suddenly come into question? Political constitutionalists can offer two answers. As they have constructed political constitutionalism, specific rules of ruling are put into play only when they obstruct the adoption of specific substantive policies concededly subject to ordinary political decision. It is highly unlikely, according to political constitutionalism, that any specific policy proposal will trigger concerns about a large number of the rules of ruling. Perhaps a bit more likely, though still not that likely, one group might want to put one rule of ruling into play because it obstructs their policy agenda and another group would simultaneously want to put a different rule into play because it obstructs their different agenda. So, political constitutionalism does introduce some instability, but its advocates contend that it is unlikely to introduce a great deal all at once. In addition, were it to be the case that a large number of the rules of ruling were in fact put into play all at once, we would be seeing something on the order of a constitutional crisis—a failure, at least in the eyes of a significant number of people, of the government to be both effective and responsive. Such crises probably cannot be avoided by any system of constitutional design, and they might be a valuable signal that there is something more deeply wrong with the nation than mere difficulties in constitutional design. And, precisely because many citizens

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will flinch from the prospect of constitutional crisis they will exercise self-restraint when such a possibility looms—or, again, so political constitutionalists suggest.

Judicial constitutionalists have another objection to political constitutionalism: it cannot rule out the possibility, which has been actualized in many nations over many years, that ordinary politics will generate policies that systematically violate fundamental human rights or policies resulting from transient political impulses whose long-term effects damage the nation. (As we will see, critics of judicial constitutionalism levy a similar charge against it.) Political constitutionalists answer this objection by stipulation. Political constitutionalism, they say, is suitable only for nations where public policy results from reasonable levels of deliberation among people enough of whom are committed to protecting fundamental rights (Waldron's phrase is "strong commitment on the part of most members of the society … to the idea of individual and minority rights," which is probably too stringent as to "strong" and "most"). Here it is important to emphasize that the commitment is to protecting rights stated in relatively abstract terms (Dworkin's concepts) rather than relatively concrete ones (conceptions).

The stipulated limits on political constitutionalism's applicability to the real world of nations today open the way for a robust judicial constitutionalism everywhere else—or indeed, perhaps everywhere, in that Waldron concedes that New Zealand might not fall within the class of nations for which political constitutionalism is suitable. And if not New Zealand, where? (But of course one could raise the same question about legal/judicial constitutionalism: how strongly

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must how many citizens be to the idea of these rights for legal/judicial constitutionalism to work?)

2.2. *Legal/judicial constitutionalism*

Frank Michelman offers a cogent argument for legal/judicial constitutionalism, in the form of an exegesis of John Rawls's *Political Liberalism*. In every polity reasonable disagreements arise over choices of ordinary policies (tax rates, as before, are an example). In Michelman's terms, constitutions *proceduralize* the resolution of those disagreements by providing a framework for choice other than sheer deployment of violence, the avoidance of which is a significant benefit. For proceduralization to work the framework has to be seen to be (reasonably) fair by all (or by enough). As a shorthand, we can say that fairness occurs when everyone understands that they will win some and lose some, and that the net of wins, losses, and the value of nonviolent resolution is positive. (Note two important conditions here: that disagreements be reasonable, which probably means that everyone can see that those who disagree are reasonable as well, though mistaken; and that the net is positive, which probably means that sometimes some group will conclude that even avoiding violence is not enough to overcome the degree to which their losses exceed their victories. If these conditions are not met, separation via secession or national self-determination may and perhaps should occur, in which we would no longer be dealing with the proceduralization of disagreement within a single polity.)

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The constitutional framework will typically contain a significant number of terms whose meaning is not obvious to all. Suppose, for example, that the framework allocates power between a parliament and an executive, and that proponents of a progressive tax system will win if the parliament can set tax rates but will lose if only the executive can. The disagreement about tax rates will move upward into a disagreement about which body can set the tax rate.

At this point a second proceduralization occurs—the creation of a body empowered to resolve disagreements about interpreting the framework (the first proceduralization) using techniques that do *not* themselves reproduce or incorporate the underlying substantive disagreement. For legal/judicial constitutionalists courts do that job by resolving disagreements over the framework's content by using law and legal reasoning rather than politics or sheer power. And, though this might not be strictly necessary for the second proceduralization to succeed, it might be that predicating the legal arguments the courts use on the nation's constitution rather than on something else not caught up in the underlying disagreements (the arguments of seventeenth century moral philosophers, for example) is more likely to gain wide acceptance because the disputants can see themselves as part of the community extended over time that created and then sustained the nation's constitution.

The key move here is obviously the final one, that law and legal reasoning are distinct (enough) from politics. At least since the advent of American legal realism in the early twentieth century and probably before, sophisticated jurists

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have known that in cases whose resolution of reasonable disagreements requires the interpretation of abstract constitutional terms, one component—not the only one, but often an important one—amounts to the translation into legalistic terms of precisely the underlying disagreement that leads to the need to interpret. How can the second proceduralization then satisfy those whose disagreement provokes the interpretive need? Wouldn't the judges' decision be understood as no more than the translation into possibly obfuscatory legal terms of the underlying disagreement—and the outcome the imposition of one of the contending positions on the partisans of the other, without showing that the resolution is compelled by the constitution's terms?

There are several possibilities. First, something akin to a confession and avoidance: yes, this obfuscation will occur, and will be understood to be occurring, but not so often as to eliminate the possibility that the second proceduralization will change the win-loss calculation enough to stabilize the system enough. This is of course an empirical question. Second, another empirical question: perhaps the obfuscation will succeed (often enough, per the first possibility) in the different sense that (enough) partisans will be fooled into thinking that the outcome is disconnected from the judges' views about the underlying merits with the effect, once again, of altering the win-loss calculation. Finally, judges may be able to develop doctrines—generally under the label "justiciability"—that allow them to avoid deciding questions where the linkage between legal outcomes and positions on

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the underlying dispute is too obvious to avoid and then actually use those doctrines (again, often enough) to make the second proceduralization yield sufficient stability.

The empirical questions noted here open legal/judicial constitutionalism up to possibilities of normative failure parallel to the failures possible under political constitutionalism. For, after all, judges can obfuscate in the service of normatively unattractive, even repugnant, specifications of abstract rights.

The well-known countermajoritarian difficulty is a species of the more general issue of politics' infiltration into law. Developed in the context of the United States, where the judges on the highest court are appointed by a president a confirmed by the legislature's upper house but then serve until they die or choose to retire, the countermajoritarian difficulty does not depend upon the details of judicial selection and tenure. (Some judges are elected, and some political scientists argue that the political input to the selection of U.S. Supreme Court justices makes them not significantly less responsive to changing preferences among the public than are other high officials.) Rather, the difficulty arises because the techniques associated with the second proceduralization are necessarily elitist techniques available only to those with substantial legal training—almost, though not quite, by definition a minority (and often a minority with distinctive demographic characteristics that make the bar unrepresentative along other dimensions).

Finally, legal/judicial constitutionalism has an obvious status quo bias: the position has bite only when judges stand ready to block the enforcement of policies adopted by today's majority in the name of decisions taken by majorities in the past.

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Today's majority can sometimes have its way. If large and persistent enough, the majority can amend the constitution using constitutionally permissible techniques that, nonetheless, impede the adoption of policies favored by mere majorities because the procedures require more than majority support for an amendment. Even that path might be blocked by courts that invoke constitutional provisions insulating specific other provisions from amendment (eternity clauses) or doctrines preventing amendments that alter what the court determines to be the constitution's "basic structure." At that point the only possibility is either a legally authorized constitutional replacement, again requiring extraordinary majorities, or an extra-constitutional revolutionary replacement.

Legal/judicial constitutionalism clearly predominates around the world today, perhaps because most advocates for constitutionalism doubt that the conditions under which political constitutional can produce effective, responsive, and non-repressive government are rarely met, perhaps because the sense in which political constitutionalism rests on law is problematic. Yet, political constitutionalism remains available as a general alternative to legal/judicial constitutionalism, ready to be brought on to the scene when particular exercises of legal constitutionalism generate high levels of political contention—or, to put it in the terms of legal/judicial constitutionalism, when the second proceduralization comes under pressure.

3. *Procedural (liberal) versus programmatic (substantive) constitutionalism*

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Some constitutions contain commitments to the achievement of specific social goals: socialism, balanced budgets, environmental protection, the social welfare state, and secularism are among the possibilities. These commitments constrain, sometimes loosely, sometimes tightly, the policies contemporary majorities can pursue. Other constitutions leave the substance of such policies largely unconstrained. They set out the procedures contemporary majorities must use to pursue whatever policies they happen to prefer. Such constitutions have traditionally been labeled "liberal," in contrast to the "programmatic" constitutions with substantive commitments.

3.1 *Procedural constitutions*

The contrast between liberal procedural constitutions and programmatic substantive ones is of course not quite as sharp as just stated. Liberal constitutions are committed to promoting human welfare (sometimes "general welfare," sometimes "the general good" and similar phrases). This is a substantive commitment; one can imagine worlds in which protecting the environment requires reductions in human welfare, for example. And it is a commitment resting on deep philosophical assumptions about people and the reasons for which they form governments. They are, in short, to some degree substantive or programmatic. Yet, the contrast may be useful in leading us to think about the degree to which constitutions contain programmatic commitments.

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Liberal constitutions also constrain policy choice by insisting that policies conform to fundamental human rights, whether stated in the constitution itself or, today, in international human rights law. Many though not all of these rights can be understood as guaranteeing the preconditions of a reasonably free and fair procedure for making substantive policy choices: freedom of expression (to allow people to advocate for any substantive policy whatever), freedom of assembly (to allow people to join together in political parties), equal voting rights, and perhaps even rights of personal autonomy (to allow people to make their own choices about which policies to support).

One important though controversial dimension of fundamental rights is a version in constitutional theory of the liberal paradox of tolerance—toleration of the intolerant—in liberal political theory. Must a purely procedural constitution allow political campaigns by a classic communist party whose program explicitly includes a promise to replace representative democracy with the dictatorship of the proletariat, or in contemporary versions by authoritarian parties whose program is implicitly "one person, one vote, one time"? This question is exacerbated by concerns about the human right of freedom of expression.

Some constitutional theorists accept the possibility of a fair vote that would abolish fair voting. In Ernst-Wolfgang Böckenförde's famous formulation (developed in a slightly different context but relevant here), "The liberal secular state lives on premises that it cannot itself guarantee" because liberal constitutions do not have

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the resources to rule out the possibility that a contemporary majority will choose to abandon liberal constitutionalism.

Other theorists and constitutional texts promote "militant democracy" as a solution to this problem. The principles of militant democracy allow and may require that governments prevent anti-system political parties from gaining enough power to be in a position merely to influence public policy, much less actually become the governing party. These principles are prima facie illiberal, as Jan-Werner Müller puts it, plainly inconsistent with principles of freedom of expression. Further, implementing militant democracy's principles has proven to be quite difficult, in the sense that most often they block political activity by groups that have no realistic possibility of gaining substantial power and that when directed at groups with some realistic possibility of that they are ineffective (the groups reconstitute themselves by making cosmetic changes in their programs, or deploy what power they already have achieved to obstruct the implementation of militant democracy's rules).

Finally, the constraints imposed by fundamental human rights might impose more than modest limitations on the range of possible substantive policy choices; they might thereby indirectly convert procedural constitutions into substantive ones. The combination of constitutional protection for private property with freedoms of assembly and expression, for example, might allow those with substantial property holdings to accumulate enough political power through domination of legacy and modern media to make it difficult in practice to enact

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strongly progressive tax policies even when such policies are favored by numerical majorities. Another example is the possibility that protections of personal and informational privacy will put those with informal social power in a position to intimidate social subordinates and limit their ability to mobilize effectively against that domination; the usual example here, though not the only available one, is the possibility that protections of privacy make it easier for men to construct the social world in ways that subordinate women systematically.

Careful construction of constitutional doctrine can avoid or mitigate these difficulties. Neither political nor legal/judicial constitutional can guarantee, though, that doctrine will be so constructed.

3.2. *Programmatic constitutions*

In the most general terms liberal procedural constitutions are neutral as to an extremely wide range of substantive policy choices. Programmatic constitutions are in contrast not neutral; they rule out some policy choices and require others. This section discusses three general types of programmatic constitutions. The first are identitarian constitutions, which inscribe specific ideas about national identity into the constitution. A second type of programmatic constitution contains commitments to second and later generation rights in addition to the human rights guarantees in liberal constitutions, which are often labeled "first generation" rights. More perspicuously perhaps, we can say that these constitutions identify substantive policies that governments *must* pursue. As mentioned earlier these can

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include commitments to the government as a social welfare state and as a protector of the natural environment. Finally, transformative constitutions are in some sense neutral because their starting point is whatever happens to be in place, but in another sense are programmatic because they direct the polity to alter the existing social order.

3.2.1 *Identitarian constitutions*

Liberal constitutions are predicated on equality of all citizens. They are, in one formulation, constitutions for nations of all their citizens. Sometimes for historically specific reasons a liberal constitution will enumerate some subgroups of citizens—by ethnicity or linguistic categories, for example—but only to emphasize that all are equal citizens. These are sometimes described as plurinational or multicultural constitutions.

Truly identitarian constitutions are different. They give special constitutional status to some specific aspects of national identity. Depending on historical and political circumstances, these might be ethnicity or religion, for example. Members of the groups that are said to "be" the nation might be guaranteed a more-than-proportionate share of political power, for example by a provision specifying that they—and only they—are eligible to serve as members of a plural presidency.

The "only they" is crucial. Identitarian constitutions of this sort exclude some citizens from some kinds of participation in the public arena. These exclusions can be express, as in versions of consociational government that cannot accommodate

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all socially significant subgroups in the institutions of public power. (These might well be all politically achievable versions of consociationalism.) Exclusions can also be implicit, as when adherents of an established religion (in a nation that also guarantees freedom of religion) in practice dominate the government out of sheer numerical predominance.

Perhaps we can understand identitarian constitutions of this sort with reference to the first proceduralization discussed above. Consider how the idea of reasonable disagreement operates in a nation with a large majority of people who are members of a religion that contains a large number of prescriptions for and prohibitions on public policy. The adherents of such a religion might well regard disagreement about a policy required by their religion as unreasonable (and, of course, similarly for the non-adherents).Under some conditions the first proceduralization will not create institutions whose products are seen by enough people as reasonable. Separate the populations, though, and the proceduralization might succeed—in separate polities each with its own national identity. A parallel argument might be available for ethnic and linguistic divisions, with disagreement about what public policies appropriately recognize (in Charles Taylor's sense) the ethnic or linguistic divisions. This account might help us understand some secessionist/separatist movements where national minorities are not the targets of gross human rights violations.

3.2.2 *Second- and later-generation constitutional rights*

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The wave of constitution-making after 1945 saw the widespread adoption in newly drafted constitutions of programmatic commitments to social welfare rights (commitments that had been inscribed in a handful of earlier constitutions). Later waves of constitution-making and constitution-amendment saw a similar development in connection with the environment. For a period in the early 2000s some constitutions began to require specific fiscal or monetary policies—typically balanced budget requirements or austerity measures said to be needed to overcome the effects of economic crises and prevent their recurrence.

Political constitutionalists have no difficulty in principle with these programmatic commitments though individual political constitutionalists might disagree with the substance of some. They can see these commitments as "directive principles of public policy" providing guidance to legislators and benchmarks that voters can use to evaluate legislators' performance.

These second- and later-generation programmatic commitments pose greater challenges for legal/judicial constitutionalists to the extent that they think that nearly all constitutional provisions must be enforceable by the courts. Standard arguments are available that would transform these apparently programmatic commitments into purely procedural ones: social welfare rights are, it is said, necessary predicates for voters to be able to make undominated (free) choices at the ballot box—raising the possibility that the combination of a procedural constitution with legal/judicial constitutionalism would displace a great deal of what most regard as ordinary policies from majoritarian decision to judicial decision.

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(Analogous arguments drawing upon the interests of future generations in making free choices are available in connection with environmental rights and balanced budget requirements.)

Further, generations of experience have produced standard judicial mechanisms for enforcing first-generation rights: an injunction against a regulation that would prohibit people from using public spaces for political demonstrations, writs of habeas corpus to release people convicted of violating an unconstitutional statute, damages for the harms caused by invasions of personal privacy, reading statutes up or reading them down to achieve equality. Such remedies are not readily available in connection with second- and later-generation rights.

How can a court enforce a right to potable water? True, a mandatory injunction could simply tell the government to provide potable water, but ensuring that the beneficiaries actually receive the water might call for a kind on-going monitoring unfamiliar in most traditional constitutional cases. Courts have responded creatively to these problems by using interim orders, keeping cases open which requiring regular reports, modifying injunctions in light of newly encountered difficulties, and setting up systems in which affected communities interact with government authorities to develop locally specific remedies responsive to local conditions. Still, concerns persist about the efficacy of these mechanisms and, in particular, about the way in which enforcing second- and later-generation rights might reduce the resources the government has to support other valuable though not constitutionally mandated goals.

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The resource problem occurs as well in cases, not uncommon, in which courts are faced with conflicts among constitutional rights. In particular, governments sometimes believe, not unreasonably, that the best way to fund social welfare programs is through the sale of natural resources or the taxation of companies that exploit those resources. Resource extraction, though, can often plausibly be characterized as a violation of constitutionally guaranteed environmental rights.

Again, courts have doctrinal techniques for dealing with such conflicts, primarily through proportionality and balancing doctrines. These techniques, though, make evident the large role courts can come to play in allocating public resources—the extent to which the courts displace rather than supplement legislative policy-making. This is even more true where, as is again not uncommon, governments might want to implement the programmatic directives but lack the administrative capacity to do so effectively.

This form of programmatic constitutionalism, it seems, is here to stay. One consequence may be pressure on the idea or at least the scope of judicial/legal constitutionalism. Coming up with coherent doctrines that limit that scope is an important (and difficult, perhaps impossible) task for legal constitutionalists.

3.2.3 *Transformative constitutionalism*

New constitutions are adopted against the background of an existing constitution. The broad outlines of a new national constitution typically resemble the broad outlines of the existing constitution: parliamentary systems rarely

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become presidential, for example, and nations with specialized constitutional courts rarely abolish them in favor of a generalist court with constitutional review jurisdiction. New constitutions of course also introduce specific innovations: constitutionally entrenched anti-corruption bodies, for example, or changes in the way in which judges are selected.

Sometimes, though, new constitutions do not replace or supplement the existing institutions or tinker with institutional details. Rather, they charge the existing institutions or modestly modified ones with adopting a wholly new—transformed—philosophy or theory of governance. They aim to transform not the prior constitution but the society itself. We should pause here to note an important point made by Gautam Bhatia: whether a specific constitution is or is not transformative can itself be controversial, particularly because, as already noted, essentially every new constitution has elements that are plainly continuations of older institutions and normative commitments.

We can understand liberal constitutions at their origin as transformative because they aimed to replace subjects (of a monarch or colonial power) with citizens. Citizens now with the power to influence and ultimately determine public policy could in the long run replace an aristocratic social order with a bourgeois one, for example, or a colonial with a local one. Resonances of this kind of transformation can be heard in more recent constitutions that similarly seek to replace subjects with citizens, in particular in nations where large populations of indigenous peoples had little effective political power.

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Transformation can occur in any direction, of course. A transformative constitution might aim to replace a liberal society with an illiberal (perfectionist or ethnonationalist) one. The most common use of the term, though, occurs in connection with constitutions that aim to replace a hierarchical social order with a more egalitarian one. For that reason equality provisions when taken seriously can be transformative.

The obvious question about transformative constitutionalism of that sort is whether or how it can succeed. We might reframe the goal of transformative constitutionalism as the achievement of a social revolution. We know that violent revolutions can move toward that goal; revolutionaries do create new constitutions quite frequently but the social transformation is the result of the revolution not the constitution. Mere constitutions seem weak instruments in comparison.

Historical and more recent experience suggests that both deep pessimism and sunny optimism might be unwarranted. The bourgeois constitutional revolutions of the eighteenth and nineteenth century eventually contributed to the victory of the bourgeoisie over the landed aristocracy. One reading of Madhav Khosla's important analysis of the drafting of the Indian Constitution is that its framers hoped that "merely" bringing India's poor into the political arena would undermine the nation's highly stratified social order—and there is some reason to think that it did so. (More generally we might connect Khosla's argument with the conditions under which political constitutionalism might succeed: enough people who participate in ordinary politics might *become* committed enough to individual and minority rights,

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as Waldron requires.) The case of South Africa, whose post-apartheid constitution inspired important reflections on transformative constitutionalism, is substantially more problematic.

In describing how transformative constitutionalism might work, the words "eventually" and "contributed" are important. Transformative constitutions make changes at the margin that might accumulate incrementally to work large changes in the social order. Or not, of course.

4. *Conclusion*

This Chapter aggregates some varieties of constitutionalism into a handful of categories. One fruitful path forward for scholarship on varieties of constitutionalism might be to come up with different ways of aggregating the many varieties. That much more remains to be said about the varieties of constitutionalism is abundantly clear.

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